

June 1973

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Recommended Citation

Thomas M. Franck & Edward Weisband, *Secrecy in the Foreign Relations of Three Democracies: A Comparative Analysis*, 50 Chi.-Kent L. Rev. 1 (1973).

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SECRECY IN THE FOREIGN RELATIONS OF THREE DEMOCRACIES: A COMPARATIVE ANALYSIS*

By
THOMAS M. FRANCK**
EDWARD WEISBAND***

I. INTRODUCTION

NEARLY THREE HUNDRED years ago, John Locke observed a degree of contradiction between democratic control of government and the exigencies of foreign relations. He concluded that the control exercised by the legislature and by law over the nation's relations with other states, which he misnamed the "federative function," would perforce be less than over other, domestic, aspects of governance. External relations, he stated, are "much less capable to be directed by antecedent, standing positive laws" than domestic affairs but must, instead, "necessarily be left to the prudence and wisdom of those whose hands it is in to be managed . . . by the best of their skill for the advantage of the commonwealth."¹ Moreover, to place this foreign relations discretion in any hands but those of the executive would invite conflict and contradiction "which would be apt some time or other to cause disorder and ruin."²

Dr. Lemuel Hopkins, leader of the Hartford Wits, in his sardonic poem attacking populism and the confederal constitution, said much the same thing:

* © Thomas M. Franck and Edward Weisband. This article is a study for part of a forthcoming book on Secrecy and Foreign Policy being edited by the authors for Oxford University Press.

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1. Locke, *Treatise of Civil Government* 98-99 (1937).

2. *Id.* at 99.

But know, ye favor'd race, one potent head
 Must rule your States, and strike your foes with dread,
 The finance regulate, the trade control,
 Live through the empire, and accord the whole.³

Some weight has even been given, indirectly, to this plea for a strong executive for the efficient conduct of foreign relations by the Supreme Court of the United States. In the oft-cited *U.S. v. Curtiss-Wright Corp.*, the Court sustained a broad delegation by Congress to the President of discretionary power to prohibit sale of arms and ammunition to parties in the Chaco war. Justice Sutherland, for the Court, spoke of the "exclusive power of the President as the sole organ of the federal government in the field of international relations" and noted that legislation which had to be implemented on the basis of "negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."⁴ What is notable about *Curtiss-Wright* from the constitutional point of view, however, is that it, and the very few similar cases,⁵ never question the right of Congress to legislate in the foreign relations field but only test whether, in legislating, Congress can delegate its own broad discretionary powers to the executive. To this question, the Court has given a qualified affirmative response. But what Congress has given must be Congress' to withhold, to retrieve, to exercise without any delegation to Presidential discretion.

Whatever Justice Sutherland's dicta may have presumed, the Constitution of the United States is not John Locke's word made law, and quite specifically not in the matter of exclusive executive authority over foreign affairs. Alexander Hamilton in *Federalist No. 69*, explicitly set out to quiet the fears of Americans that the Constitution did, in fact, propose to give the executive such a monopoly. "The President," he wrote, "will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union."⁶ The President's power as supreme commander "would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and ad-

3. Hopkins, *The Anarchiad*, *The New Haven Gazette*, Oct. 26, 1786-Sept. 13, 1787, reprinted in part, including the quoted excerpt, in 1 Vernon L. Parrington, *The Colonial Mind 1620-1800*, at 372 (1927).

4. 299 U.S. 304, 320 (1936).

5. Cf. *United States v. Chemical Foundation*, 272 U.S. 1 (1926).

6. *The Federalist No. 69*, at 415-420 (W. Kendall & G.W. Carey, eds. undated) (A. Hamilton).

miral of the Confederacy" but it would explicitly not include the power of "*declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature."⁷ The President is also "to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority."⁸ Hamilton, as did John Jay, also emphasized the balancing power of the Senate to concur in the appointment of ambassadors.⁹ Jay added that the Senatorial role would ensure that "the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued."¹⁰

Jay, addressing himself squarely to the question of secrecy, conceded that the executive branch might sometimes, in the negotiation treaties, need "perfect secrecy" to achieve "immediate dispatch."¹¹ There would also be occasions "where the most useful intelligence may be obtained, if the person possessing it can be relieved from apprehensions of discovery." There might be secret informants who would "rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly."¹² However, Jay prophesied: "Those matters which in negotiations usually require the most secrecy and the most dispatch" would be "those preparatory and auxiliary measures which are not otherwise important in a national view." He added that the Senate's "talents, information, integrity and deliberate investigations" would always balance the executive prerogatives of "secrecy and dispatch."¹³

It is not only in the United States, but in every democracy, that the people have constantly sought reassurance that their executive's need for "secrecy and dispatch" in foreign affairs would be balanced and checked by a vigorous, informed legislature and public. In the words of the recent report of the Franks Commission in Britain:

[f]rom the earliest times governments of all types have been anxious to preserve secrecy for matters affecting the safety or tactical advantage of the State. It is, however, the concern of democratic governments to see that information is widely diffused, for this enables citizens to play a part in controlling their common affairs.

7. *Id.*

8. *Id.*

9. *Id.* No. 64, at 390-396.

10. *Id.* at 392.

11. *Id.*

12. *Id.* at 392-393.

13. *Id.* at 393.

There is an inevitable tension between the democratic requirement of openness, and the continuing need to keep some matters secret.¹⁴

This checking and balancing has two functions: 1) to ensure that executive discretion stays within the boundaries of the foreign affairs prerogative and does not replace legislation as the way to regulate the internal affairs of the nation; and 2) to ensure that the public is adequately, if not in every instance immediately, informed so that their executive could still be held to account, even in foreign affairs. In the words of John Stuart Mill, "if the public, the mainspring of the whole checking machinery, are too ignorant, too passive, or too careless and inattentive to their part," democracy fails. "Without publicity," Mill asks, "how could they either check or encourage what they were not permitted to see?"¹⁵

Not the written constitution of the United States, nor the half-written constitution of Canada, least of all the unwritten constitution of Great Britain, has succeeded in establishing the balance decreed by democratic theory between the imperatives of executive discretion and secrecy in matters of foreign affairs including defense, on the one hand, and the public's need and right to participate, knowledgeably, in the democratic process—either directly or through their elected representatives. There is no abstract basis upon which to reconcile the demands of the government for "secrecy and dispatch" with those of the demos for access to information. When the executive—the President, a cabinet minister, a senior bureaucrat—refuses information, the government usually argues the case for security, speed, and for preserving the integrity of an internal bureaucratic advisory process. But when legislatures, the press, and an aroused public demand information, they are really calling for a right to participate either in making, or in reversing, a decision. The executive champions functional utility. The demos argues for the supremacy of democratic process. Without concern for utility, the society is doomed from without or disintegration from within. Without concern for process, the society is scarcely worth preserving—at least for those who hold liberal democratic values. All democracies concerned for survival, therefore, must strive to maintain a functional balance between these competing demands.

Such a balance, however, cannot be captured in philosophic abstraction or even in constitutional formulas. If there is a balance, it is

14. 1 Departmental Committee on Section 2 of the Official Secrets Act 1911, Cmnd. 5104, at 9 (1972) (hereinafter cited as Franks Report).

15. Mill, *Considerations on Representative Government* 13 (1872).

likely to be an imperfect, shifting, dynamic, tension-filled equilibrium compounded by numerous small accommodations between the key actors in a society's foreign policy process. There can never be a final solution.

Before examining the praxis by which three democracies, of varying international personalities and degrees of power, attempt to approximate this balance, it is useful to define the *actors* in the balancing process. And since the subject of this study is *secrecy*, rather than the constitutional balance of power in general, it is necessary to define the *role of secrecy* in the interactions between these actors.

II. PRINCIPAL DOMESTIC ACTORS AND INTERACTIONS

The principal domestic actors in the field of foreign affairs¹⁶ in Canada, the United States and Britain are:

- (1) the executive (consisting of the head of government, the cabinet, sub-cabinet, senior bureaucrats and other special advisers and assistants);
- (2) the legislature (including its committees and staff if any);
- (3) the press;
- (4) special and public interest groups (business, trade unions, public affairs organizations, consumer groups, *etc.*).

Other states, perceived as single entities or in terms of their multiple domestic actors, constitute additional actors in the field of foreign affairs.

In all three countries, there are general guidelines that attempt to harmonize the roles of the principal domestic actors. It is broadly agreed that the public and special interest groups may play an important role in elections and may, to a limited extent, testify and lobby on issues before the executive and legislature. The legislature in each country may ask the government questions, examine policies in open debate, in committee and in party caucus and threaten to withhold funds or defeat legislation desired by the executive. The press enjoys broad, but not unlimited, freedom to investigate and criticize executive actions.

Despite these guidelines, tensions predominate and conflicts arise. It is to a considerable extent inherent in the role of each actor that

16. "Foreign affairs" in this essay is, throughout, used to denote the areas of (1) national defense, (2) diplomatic relations, (3) international trade and (4) international monetary relations.

this should be so. These tensions and conflicts frequently center on executive secrecy. The press, legislature and interest groups want to share the executive's virtual monopoly of secrets in the foreign affairs field. Thus, the interaction would at first appear as a simple struggle for access to secret information between one actor and all the rest. This may be portrayed as a tug-of-war over information which the executive tries to keep in the realm of secrecy and the other actors try to pull into the public domain (FIG. 1).

FIG. 1



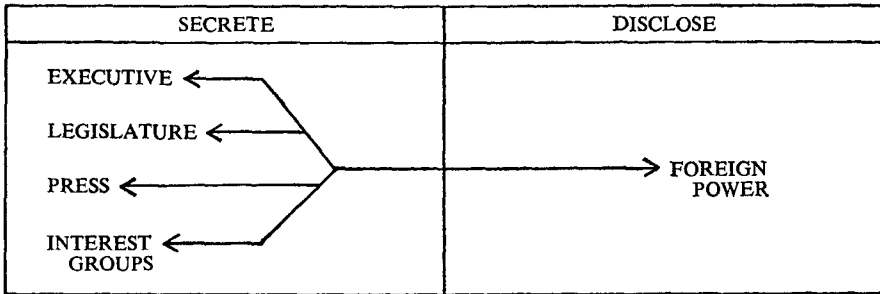
This is not, however, a universally valid representation of the balancing struggle and conflict between the four principal actors. There are situations, although rare, in which the executive is confronted by a concurrent challenge to its secrecy from all three of the other actors. Traditionally, the interactions take the form of coalitions and shifting alliances between the executive and one or more of the other actors, alliances which may be based on selective sharing of secrets or simply on perceptions of mutual self interest. Both the New York and the London *Times* have been told secrets by the executive in order to ensure the cooperation of those journals, on the understanding that the information would not be revealed either to the legislature or to the public. Similarly, influential non-cabinet members of the legislature are sometimes co-opted by the executive's selective revelations to them, always on the understanding that the secrets would be kept from their parliamentary colleagues and the press. Thomas L. Hughes, a former director of the U.S. State Department's Bureau of Intelligence and Research, has proposed that such executive co-option of a few key legislators be institutionalized.¹⁷ The process is one of unstable coalitions and shifting alliances. In a war or severe national crisis (FIG. 2) all the actors may rally patriotically behind executive secrecy even without being co-opted. It is at such times, notoriously, that the legislature, press and public agree to the enactment of broad executive powers to classify, censor and suppress as

17. Hughes, *The Power to Speak and the Power to Listen: Reflections on Bureaucratic Politics and a Recommendation on Information Flows* (New York University Center for International Studies, mimeo, 1973).

well as punish the "leaking" of information. Such official secrets espionage laws and classification regulations often survive long beyond the crisis and the patriotic coalition which made them possible.

FIG. 2

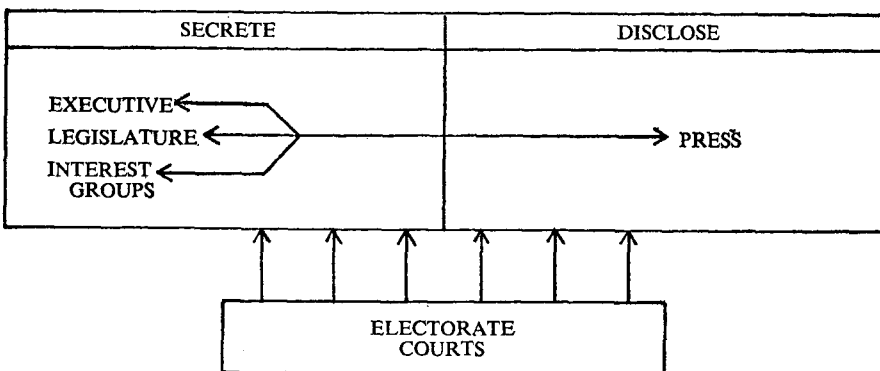
"THE INTERNATIONAL CRISIS ENCOUNTER MODEL"



A variation of this is the situation (FIG.3)—usually in wartime or in severe international crisis—in which a newspaper or wire service breaks censorship or reveals information, such as troop movements or a key date, occur under circumstances which the other actors deplore. Here, again, the executive establishes a coalition built on a common national team-interest in security rather than by sharing secrets in order to buy co-optive behavior.

FIG. 3

"THE PRESS AS DEVIANT ACTOR MODEL"



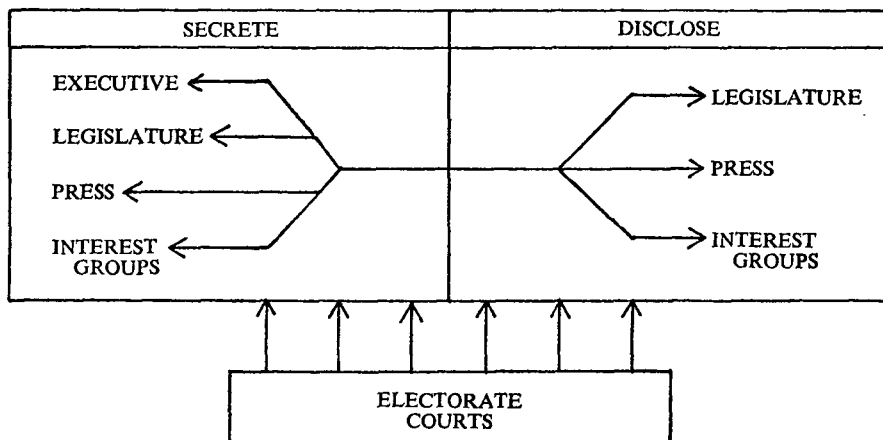
In these cases, a deviation has occurred which may lead to a serious conflict. This is generally played out among the actors themselves; but, it could conceivably become a key issue in a national election or the subject of criminal prosecution or civil litigation. It is the umpiring

role of electorates and courts which is represented in FIG. 3. In Britain in 1916, during the first World War, it was, oddly, the Deputy Chairman of the *Military Mail* newspaper who was indiscreet. He was prosecuted, together with his informant, for the contents of a column entitled "Heard in Whitehall, by Mars." Both men were sentenced to two months imprisonment.¹⁸ Such prosecutions are, however, extremely rare (see below), as are press violations of security or censorship in wartime.¹⁹ When it does occur, offenders are most frequently scorned rather than supported by the balance of the press. However, when prosecutions or suits to prevent publication for violation of security are attempted in peacetime, the press generally rallies around, as in the recent cases of the Pentagon Papers published in *The New York Times*²⁰ and the British adviser's report on the Nigerian Civil War published in the London *Sunday Telegraph*.²¹

There are also situations in which the Legislature has used its powers to attempt to force the executive to reveal information which can be used to damage or persecute individuals. Congressional Committees investigating disloyalty and subversion have sometimes succeeded in driving at least some of the press and some interest groups to rally on the side of executive secrecy against abuses of Congressional scrutiny (FIG. 4).

FIG. 4

"THE JOSEPH McCARTHY MODEL (CIRCA 1953)"



18. London Times, April 3, 1916, at 3; *id.* May 4, 1916, at 5. Franks Report, *supra* note 14, at 116, app. II.

19. For an account of U.S. wartime censorship, see Wiggins, *Freedom or Secrecy* 96-100 (rev. ed. 1964).

20. *United States v. New York Times*, 403 U.S. 713 (1971).

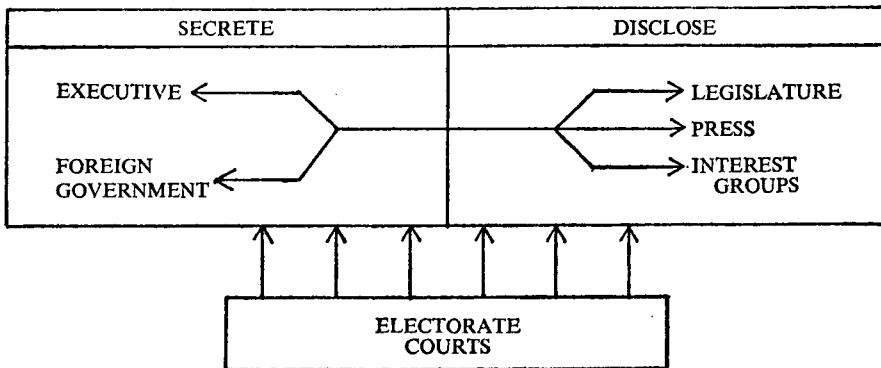
21. For an account of this case see Aitken, *Officially Secret* (1971).

In this encounter, both courts and voters played an important role, not as parties directly involved in the encounters but as arbiters of the conflict. It should also be noted that the press and the legislature, while directly involved, are not solidly ranged on one side but divided in their support of the adversaries.

During diplomatic negotiations, both the national and the foreign governments taking part may agree that secrecy would enhance the process. A similar inter-governmental consensus may operate in the case of secret treaties and executive agreements. In both instances (FIG. 5), the legislature, press, and interest groups may be ranged on the side of disclosure in opposition to their own and the foreign executive.

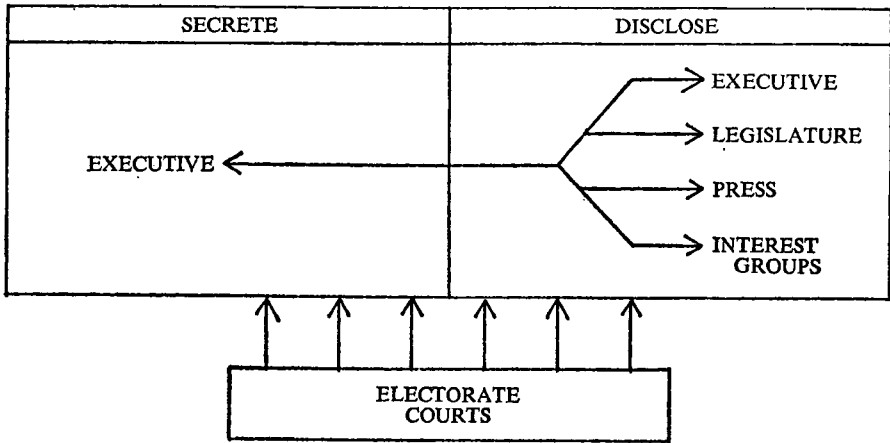
FIG. 5

“THE SECRET NEGOTIATION/AGREEMENT MODEL”



Whether or not the three principal political actors, or the voters or courts, will become embroiled in such a conflict must depend, at first instance, on whether anyone becomes aware of the secret negotiation or agreement. The best secret is one the very existence of which is, itself, a secret. The occasion for a conflict will thus depend on diligent investigation by one or several of the other actors or on a “leak” from within the executive (FIG. 6). An executive leak may place a disaffected part of the executive alongside the legislature, press and interest groups.

FIG. 6
 "THE ELLSBERG MODEL (CIRCA 1971)"



In "leak" incidents, the courts are more often involved if prosecutions are brought against one or a coven of public servants who have failed in their vows of obedience and verbal chastity. Another kind of "leak," however, involves no such sanctions. The executive itself may selectively reveal hitherto secret information to mobilize public opinion for a new initiative or to secure funding of a pet defense project.

As noted, the executive may seek to co-opt one, or several, principal actors by selective disclosure in return for support for a policy and a promise not to disclose to others. However, an actor may also actively seek disclosure to himself and be equally anxious to prevent disclosure to others, that is, he may solicit co-option while hoping thereby to co-opt. For example, in the preparation for, and conduct of trade negotiations, a special interest group representing export industries may find itself in conflict with the executive in trying to learn what the State and Commerce Departments are thinking and planning. However, the same lobby will also be in conflict with the import industry's representatives and with consumer groups which are also trying to obtain access in order to influence planning in the opposite direction. In the United States, for example, this issue is currently hotly contested between industry representatives who are allowed to populate executive advisory boards on trade policy and consumer representatives who are excluded.²² In the fishing industry, rival groups vie for position close to the ear of government.

22. Cf. Memorandum of Secretary of Commerce Peterson, Exemption of the

Basic to each of these encounters, is the possession of a secret by the executive and the countervailing efforts by one or several principal actors to have that secret disclosed. To that extent, secrecy is the common coin of these encounters. One way to put this is that secrets are power. It would seem to follow that the executive's "score" in the larger power balancing-contest between it and the principal actors of the demos could be measured by how well it keeps its secrets. Conversely, it would follow that the success of other actors in the power-balance would depend on how many secrets were pried out of the executive. This is, however, a simplistic analysis. Secrets are kept by the executive as defense *against* a designated opponent and are merely denied to other actors to make sure the secret does not filter to the opponent. If another actor, not the opponent, achieves disclosure, then it is still only the opponent, not the actor who achieved disclosure, who benefits. Further, to complicate analysis, secrets are sometimes kept by the executive even when none of the other domestic actors is a designated opponent. In such instances disclosure may impose a cost on the executive without bestowing a gain on any of these other three actors. The only gain may, instead, accrue, to a foreign actor. Correspondingly, the real winner may be a faction within the executive itself, involved in a dispute amongst themselves. Secrets may also be kept by the executive out of inertia or lassitude. Their revelation constitutes no power loss to the executive and, perhaps, no power gain to any other actor.

There are other ways a direct power-secrecy correlation does not work. A secret kept has a power value for the executive quite different from its value to another actor when disclosed. The press, for example, does not gain power over foreign policy to the same extent that it denies prerogatives to the executive by disclosure.

III. A TAXONOMY OF PRINCIPAL FOREIGN AFFAIRS SECRETS

A taxonomy of secrets is a beginning towards understanding the role which secrets play in the continuing power struggle among executive, legislature, press and interest groups. Our taxonomy (1) sorts secrets into categories by what they are about; (2) examines which actor or actors stand to gain by disclosure (the secret's real "oppon-

Management-Labor Textile Advisory Committee from the Public Participation and Record Keeping Requirements of Executive Order 11671, Aug. 30, 1972. *See also* New England Governors Conference v. Morton, Civil No. 13-59 (D. Me., filed April 27, 1972), which alleges failure by the executive to engage in public consultation with interest groups before making oil import quota regulations.

ent"); and, (3) indicates what the executive gains by denying the secret to the "opponent."

TAXONOMY OF PRINCIPAL FOREIGN AFFAIRS SECRETS

CATEGORY OF SECRET	OPPONENT	REASON FOR DENIAL OF SECRET TO OPPONENT
Defense plans; strategy, operations, deployment	Hostile or potentially hostile foreign powers	To preserve tactical capacity to surprise enemy and reduce vulnerability to surprise by enemy
	Legislature, press, public	Prevent exposure of mistakes, debacles; preclude public participation in choice of plans
Weapons research and development	Other states	Surprise, options, flexibility; ability to market obsolescent weapons
	Legislature, press, public	Prevent intervention in key decisions; prevent investigation of policy, cost-over-runs, etc.; prevent criticism for failure
	Interest groups	Reduce pressure, intervention
Diplomatic negotiations	Nations outside the negotiations	Prevent interference from those excluded, to facilitate "ganging up" by surprising those excluded
	Press; legislature, public, interest groups of the negotiating states	Prevent interference by interest groups; prevent grand-standing by participants; encourage flexibility by making it easier to change positions without loss of face; prevent criticism for failures
Treaties, agreements	Nations against whom treaties directed	To preserve capacity to surprise; to avoid prematurely alarming, threatening those against whom treaty directed
	Own legislature, press, interest groups, public	To avoid opposition, efforts to amend or prevent treaty or execution of treaty commitment; prevent criticism for failures
Information about other nations' defense plans, secret diplomatic negotiations, secret treaties and agreements	The nation whose secret it is	To preserve the predictability of opponent while retaining own option to surprise
	Own press and public	To preserve options without pressure from public to over-react
Executive process: cabinet minutes, intra-departmental memoranda, expert advisory briefs, reports from diplomats	All other states	To prevent outside states from mistaking advice for policy and mis-reacting; to withhold "dirty linen" that affords other states propaganda advantage
	The legislature	To preserve openness, integrity, of internal processes of Executive branch by immunizing advisors, officials from

		Legislative review of their advice; prevent participation
	Special interest groups	To prevent pressure and deny participation
	The press and public	To prevent pressure, deny participation; prevent criticism for failures
Monetary negotiations	Currency speculators	Surprise; prevent intervention; retain flexibility
Executive preparations for tariff negotiations or new regulations	Special or public interest groups	To limit participation and opposition
Tariff or import agreements	States excluded from preferential treatment	To prevent hostility, retaliation, under-cutting
	Legislature and Special interest groups	To prevent participation and opposition
Intelligence reports from own agents	Most other states	Prevent identification of agents; retain surprise, options
	Legislature	Prevent participation in policy-making, opposition and criticism for failure
	Press, public	Prevent participation in policy-making, opposition, and criticism for failure
Intelligence reports from allies	Most other states	Retain integrity of secret intelligence relation with ally; retain surprise, options
	Legislature, press, public	Prevent participation in policy-making, opposition

IV. THE PRAXIS OF SECRECY AND DISCLOSURE IN THREE DEMOCRACIES

A. Secrecy in Executive-Legislative Relations

In the area of foreign relations, in all three countries, it is the executive which possesses the secrets, leaving the legislature to try to find them out as best it can. This is not to say that the legislature may not, itself, sometimes create secrets. The Continental Congress of the United States resolved "That every member of this Congress considers himself under the ties of virtue, honour, and love of his country, not to divulge, directly or indirectly, any matter or thing agitated or debated in Congress, before the same shall have been determined, without leave of Congress; nor any matter or thing determined in Congress, which a majority of the Congress shall order to be kept secret. And that if any member shall violate this agreement, he shall be expelled this Congress, and deemed an enemy to the liberties of America, and liable to be

treated as such. . . ."²³ The Continental Congress, in 1775, established a committee "for the sole purpose of corresponding with our friends in Great Britain, Ireland and other parts of the world" which actually became known as The Secret Committee, reflecting its preferred and accepted method of operating.²⁴ More recently, Congressional Committees have sometimes met in secret, and so, on occasion, have British wartime parliaments.²⁵ Even so, this secrecy is frequently no more than a symptom of co-option, the executive whispering into the legislator's ear.

To say that the executive possesses most of the country's secrets could lead to the impression that a tight little island of government hoards information and defends it against all outsiders. The executive is, however, less than a unitary entity when observed from within, and components of the executive keep secrets from each other. In Britain, for example, "The Prime Minister is the only member of the Cabinet who is informed of everything" because "the Cabinet office places at his disposal information on every single Cabinet activity, while ordinary members have detailed knowledge only of those matters dealt with in the various [cabinet] committees of which they were members or of their own departments."²⁶ Particularly in defense and foreign policy, Prime Ministers, at least from Disraeli forward, have operated primarily on their own. They have sometimes utilized a small inner cabinet committee, on occasion excluding most of the cabinet while including some extra-parliamentary members in a Committee on Imperial Defence, or a war cabinet. More frequently, Prime Ministers exclude the whole cabinet while relying on their own secretariat and technical or bureaucratic advisers.²⁷ The Foreign Office in Britain, quite as much as the State Department, has frequently been on the outside, looking in on foreign policy decisions made mainly by others. When Aneurin Bevin became Foreign Secretary in 1945, he was told by a departmental subordinate, "We have not been the Foreign Office for years. We have been merely a post office for Number Ten Downing Street."²⁸ Chamberlain had earlier carried on secret foreign rela-

23. Resolution of Secrecy Adopted by the Continental Congress, Nov. 9, 1775, in Documents Illustrative of the Formation of the Union of the American States 18 (1927).

24. Bemis, *A Diplomatic History of the United States* 22 (5th ed. 1965).

25. The power, in the case of Parliament, appears to be inherent rather than statutory.

26. Berkeley, *The Power of the Prime Minister* 51 (1968).

27. *Id.* at 50-59.

28. *Id.* at 56.

tions with Mussolini without informing his Foreign Minister, Anthony Eden.²⁹ Eden, in his turn, came to formulate his crisis policies towards Egypt, in 1956, without consulting his cabinet until a few hours before the British-French ultimatum was dispatched to Nasser.³⁰ British negotiations with the Common Market were played close to the vest of Prime Minister Macmillan, with only a very few of the cabinet being informed or consulted.³¹

It is not only the legislators, therefore, from whom foreign policy secrets are kept. Adlai Stevenson's experience in arguing a case in the Security Council at the time of the Bay of Pigs escapade, having been denied the truth by his own government, is merely one dramatic instance of deliberate secrecy within the disparate American executive branch. There are many others.³² Perhaps the most remarkable aspect of intra-executive secrecy practice in Britain is the unwritten, but iron-clad, rule that a newly incoming cabinet will not be shown the secret papers and records of its predecessor—that these will, instead, be summarized as the need arises, by the senior bureaucrats. The civil service, as interlocutor, obviously amasses considerable power. In America, it has been suggested, the members of an outgoing administration keep the secret files from their successors by shipping them home or, under embargo, to repository libraries.

It is, however, the secrecy employed by the executive to fend off inquiries from the legislature that produces one of democracy's major headaches. The executive denies secrets to the legislature in Canada, Britain and the United States under three heads, the applications of which are set out in the taxonomy. Although some of these reasons differ in detail, they are broadly similar:

- (1) reasons of national security
- (2) reasons of internal management
- (3) reasons of constitutional practice.

It is frequently pointed out by the executive that secrecy is not directed *against* the legislature or the public, but is merely designed to achieve security objectives which are to everyone's benefit. An insis-

29. *Id.* at 58.

30. *Id.* at 59.

31. *Id.*

32. Lincoln White, speaking for the State Department, categorically denied the U-2 surveillance overflight without knowing what the C.I.A., the Russians, and soon the whole world knew about the matter. Hilsman, *To Move a Nation* 83ff (1967).

tence on disclosure, it is argued, would benefit no one except the "enemy." This contention is not invariably fanciful or paranoid. Richard E. Neustadt has explained that Senate hearings on Truman's Korean war policies, after the dismissal of General MacArthur, placed the executive in the position of having to expose its "innermost thoughts about the further conduct of hostilities."³³ In defending itself against the pro-MacArthur line taken by some Senators, officials made a strong case against any further attempt to conquer North Korea. This placed the "enemy" on notice, even before negotiations had begun, that United States policy-makers had unilaterally renounced what might otherwise have been an important bargaining chip. Neustadt attributes the two year stalemate in Korean truce negotiations, in part, to these revelations.³⁴ In Britain, the resignation in 1915 of Sir Edward Carson, the Attorney General, in disagreement over British war plans in relation to Siberia and Gallipoli, led to a rather open discussion of these plans in Parliament.³⁵ This may have been more illuminating to the Germans and Turks than to the M.P.'s. The Suez crisis of 1956, on the contrary, came and went with Parliament left almost entirely in the dark, for fear of giving aid and comfort to the enemy. It is still in the dark about the truth of that affair. The crucial British decision to abandon its historic military role "east of Suez" was briefly mooted to parliament in 1966 on the occasion of the resignation of Christopher Mayhew, the Minister of Defense. Thereafter the argument continued in secret, inside the cabinet, until January, 1968, when the final decision was announced, full-blown and unalterable, to parliament.³⁶ Questioning of cabinet members by backbenchers in Parliament generally tends to stop short of anything that could aid an enemy. Neither in Britain nor in Canada is there a disposition to press ministers for answers once they have pleaded "national security," the Fifth Amendment of Cabinet officers.

Governments also tend to refuse information to the legislative branch on the ground that it concerns privileged communications either from foreign friendly governments or from advisers within the executive establishment. In either case, it is argued, the revelations would have a "chilling effect," embarrassing the source of the communication and discouraging frankness in the future. The Canadian and British governments both registered some dismay at the disclosure, via the

33. Neustadt, *Presidential Power: The Politics of Leadership* 30 (1960).

34. *Id.* at 30-31.

35. 75 Parl. Deb., H.C. (5th ser.) 535 (1915).

36. Walker, *The Cabinet* 122-131 (1972).

Pentagon Papers, of communications made by them in confidence to Washington. Both governments privately expressed the determination to be more guarded in future exchanges with the U.S. But there is little evidence that this has actually happened. Conversely, in examining their own secrecy policies, Canadians have frankly admitted the necessity of remaining "in step" with the British and American security rules since so much Canadian intelligence originates with those two governments³⁷ and premature Canadian disclosure could embarrass its two larger allies and its allies' informants.

Similarly, in both Canada and Britain there operates between the executive and the bureaucracy an unwritten (but enforced) compact which requires the latter to remain wholly loyal and wholly silent and the former to act as a buffer separating and protecting the civil servant from investigation or criticism by the legislature.³⁸ The silence imposed on a civil servant in exchange for this protection is reenforced, in Britain and Canada, by sections 2 and 4 of their respective Official Secrets Acts.³⁹ The protection takes the form of executive refusal to discuss with Congress or Parliament the content or quality of the advice received from its bureaucrats. In the United States, former Attorney General Kleindienst recently stated "Congress likewise has recognized the validity of claims of executive privilege for internal advice to the President. The privilege has been invoked to promote frank advice within the executive branch and preserve confidentiality regarding conversations with the President."⁴⁰

Constitutional doctrine is also invoked by the governments to justify keeping executive secrets from the legislature. In Britain and Canada it is the doctrine of cabinet collective security which serves. Broadly, this "unwritten convention of the Constitution" holds that "every member of the government [cabinet and sub-cabinet] must accept and if necessary defend cabinet decisions even if he opposes and dislikes them."⁴¹ This common front is deemed essential to the parliamentary system—the common front being necessary not only to keep the opposition at bay but to hold the Government's parliamentary supporters in line. Crucial, therefore, is the deliberate "concealment

37. Report of the Royal Commission on Security (Abridged) 81 (Ottawa 1969).

38. Franks Report, *supra* note 14, at 27.

39. Official Secrets Act 1911, 1 & 2 Geo. 5, c.28 § 18, sched. 2.

40. Statement of Richard G. Kleindienst, Attorney General, *Hearings on S. 858 and S.J. 72, Executive Privilege, Before the Separation of Powers Subcommittee of the Committee on the Judiciary and the Intergovernmental Relations Subcommittee of the Committee on Governmental Operations*, 93rd Cong., 1st Sess. (1973).

41. Walker, *supra* note 36, at 27.

of difference"⁴² within the cabinet. A minister who disagrees with the views of his colleagues may resign and may even attack from the back benches of the Commons or the Lords, but he may not, while remaining in government, reveal anything of the frank and often bitter discussions and divisions which occur within the government but which are papered over by "collective responsibility."

In the United States it is the constitutional doctrine of the separation of powers which is often invoked to withhold executive secrets from the legislature. Unlike the British or Canadian governments, the U.S. executive's arrival does not depend on retaining control of the voting majority in the legislative branch. Secrecy cannot, therefore, be invoked on grounds of partisan necessity. Instead, it is asserted that a legislative incursion into the written communications, memos, intelligence or other secrets of the executive would represent an attempt by one co-equal, but separate, branch of government to establish primacy over the other. Thus, when a committee of the House of Representatives, in 1796, demanded to see copies of the instructions and other documents used in negotiating the Jay treaty with Great Britain,⁴³ President Washington held that "a just regard to the Constitution and to the duty of my office under all circumstances of this case, forbids a compliance with your request."⁴⁴ William Howard Taft, after being President, was equally confident of the constitutional right to refuse.

The President is required by the Constitution from time to time to give to Congress information on the state of the Union, and to recommend for its consideration such measures as he shall judge necessary and expedient, but this does not enable Congress or either House of Congress to elicit from him confidential information which he has acquired for the purpose of enabling him to discharge his constitutional duties, if he does not deem this disclosure of such information prudent or in the public interest.⁴⁵

This view, expressed sometimes more, sometimes less vociferously⁴⁶ appears to inhere in the office of Chief Executive. President Eisenhower informed Congress that "throughout our history the President has

42. *Id.*

43. *Annals of Cong.* 534 (1793) [1793-1795].

44. 1 Richardson, *Messages and Papers of the Presidents* 188 (1897), cited in Bishop, *The Executive's Right to Privacy: An Unresolved Constitutional Question*, 66 *YALE L. J.* 477 (1957).

45. Taft, *Our Chief Magistrate and His Powers* 129 (1916).

46. Cf. Berger, *The Presidential Monopoly of Foreign Relations*, 71 *Mich. L. Rev.* 1 (1972); Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 *U. Pitt. L. Rev.* 755 (1959).

withheld information whenever he found that what was sought was confidential or its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation." In particular, the President regarded it "essential to efficient and effective administration that employees of the executive branch be in a position to be completely candid" and they "are not to testify to any such conversations or communications or to produce any such document or reproductions" before the McCarthy subcommittee. "I direct this action," the President emphasized, "so as to maintain the proper separation of power"⁴⁷

The three reasons commonly advanced by governments to deny secrets to legislators are, however, much abused. Consider the reason of "national security." Legislative inquiry relating not to present but to past events cannot seriously be justified on this unfirm ground. Yet long-past events remain shrouded in secrecy in all three countries. Genuine concern for the integrity of confidences from other governments is another reason. Yet this valid concern could be met, in most information before it is disclosed. Then there is the matter of protective bureaucratic confidences. Undoubtedly, especially in periodic populist waves of witch-hunting, the executive may be justified in protecting the anonymity of its internal advisory system by refusing to disclose controversial advice given it by members of the bureaucracy. Such protection may sometimes be necessary to ensure fearless, unpopular advice from within the executive branch, if the apparent purpose of seeking disclosure is to destroy the bureaucrat's radical independence. In most cases this, too, can be achieved by exorcising the name of the advisor. But it is doubtful whether there is so much unpopular, fearless or dissident advice in need of protection. The Pentagon Papers indicate that the bureaucracy did not, in fact, challenge the political leaders with radical alternatives. In Britain and Canada, too, there is a pervasive opinion among Members of Parliament that executive secrecy is less intended to protect the bureaucrats from legislators' witch-hunts than to preserve the civil servants' virtually exclusive access to the ministerial ear. This opinion is coupled with another: that the bureaucrats' advice, protected from challenge by secrecy, tends to be conformist rather than innovative.⁴⁸ Thus, secrecy may protect bureau-

47. 94 Cong. Rec. 6621.

48. For a British parliamentary view to the effect, see R. MacLennan, M.P., *Secrecy and the Right of Parliamentarians to Know and Participate in Foreign Affairs* (New York University Center for International Studies, mimeo, 1973). A similar Canadian parliamentary view is expressed by Gordon Fairweather, M.P., *The*

cratic power more than bureaucratic independence. The two are not the same.

As for the constitutional arguments, it is evident that these, even if correct as stated, are being applied much more generously by the executive to deny information to the legislatures than is absolutely necessary either to preserve the separation of powers in the United States or to maintain collective cabinet responsibility in Britain. In all three countries the overriding purpose of secrecy in foreign affairs is not to frustrate external enemies, nor to protect the integrity of the bureaucracy, nor even to safeguard constitutional abstractions. The principal purpose of secrecy is to retain power, especially freedom of initiation, unfettered in the hands of the executive. To share secrets is to share competence both to make decisions and to criticize decisions. In all three democracies secrecy is both a symptom and, in part, a cause of executive predominance in foreign affairs.

The legislatures in the United States, Canada and Britain are not, however, without some means for asserting at least a secondary foreign relations role. There are, in each, efforts underway to strengthen that role and to redress what is believed to be a balance tilted much too far in the direction of secrecy and unchecked executive power. This does not, of course, ensure a wiser foreign policy. What legislative participation tends to ensure is a broader base of consent for whatever policy is eventually decided. This ingredient of legitimation is important in democracies, not least to the executive which, in its absence, may find itself trying unsuccessfully to mobilize the country to a policy for which the people and their parliamentarians are unwilling to lend the necessary moral, financial and physical support. Secondly, legislative participation also tends to be a check on one-man decision-making which, while sometimes brilliant, is prone to self-compounding error, ego-justification and even obsession. In Britain and Canada, the Prime Minister is usually surrounded by a cabinet of men and women with sufficient political clout of their own to prevent this from happening, even without more parliamentary participation. In the United States, the cabinet is far more subservient to the White House, and the White House is the instrument of one man. In practice, the President generally seeks and takes advice in foreign affairs. But neither his constitu-

Role of Parliament in the Review and Planning of Canadian National Defense and External Affairs (New York University Center for International Studies, mimeo, 1973). Essentially the same view is expressed for the U.S. in Rourke, *Bureaucracy and Foreign Policy* 62-80 (1972).

tional relation to his cabinet nor the balance of political power inside the executive makes this inevitable. For this reason alone, Congressional participation can be of major importance to a healthy foreign policy.

Before examining the tools available for the assertion of this role, it should first be noted, however, that in America, secrecy has perhaps become too central in the struggle to stake out a legislative role in the foreign affairs field. The British and Canadian parliamentary opposition parties seem somewhat less inhibited in their criticism of government policy by lack of access to secret information. In the United States, Richard Barnet has correctly asked: "Should the fact that the citizen and his representatives in Congress share only a fraction of the information about the outside world that is available to the national security bureaucracy seriously inhibit them from making independent critical judgments about policy?"⁴⁹ During the Vietnam crisis, the government constantly intimidated opponents with the warning that they did not know the whole story and should therefore suspend arguments based on nothing more than common sense. The Pentagon Papers have shown, however, that the secret intelligence reports hidden from Congress, more often than not, only confirmed the common sense view, and, at its best, reported information readily available in *The New York Times* and *Le Monde*. Congress need scarcely have hesitated to criticize the executive security managers out of deference to what they knew but were not sharing. Information can be a sacred cow, made too important. Indeed, lack of information can be an excuse for abdication. Congress' failure to oppose the war earlier and more effectively is probably due less to a really debilitating lack of secret information than to the sharing by Congress, of the wrong-headed political assumptions of the Executive.

In all three countries the legislatures possess certain powers to compel disclosure which are so draconian as to be, in political practice, unusable. In the United States this includes the power of presidential impeachment. Only a little less drastic is the capacity of the British and Canadian Parliaments, in a vote over a matter of substance, to defeat a government "on the floor" for failure to disgorge information. Normally, party discipline and the perceived self-interest of Members of Parliament in "voting at their party's call" would almost always ensure against such an occurrence. Only a little less sledgeham-

49. Barnet, *Roots of War* 285 (1972).

mer-like is the power of Congress to fail to vote foreign and defense appropriations and the Canadian and British Parliaments' right to fail to supply votes. In practice, both involve a rare act of rash courage on the part of legislators, a firm belief that the government, embarked on a disastrous course, must be stopped at all costs.

There are, at the disposal of the Canadian and British Parliaments, more finely calibrated weapons, but their effectiveness is quite limited in the face of determined executive non-disclosure. The classic instrument for "finding out" is the question period at the beginning of the day's sitting. Members cannot, however, use this opportunity for free-flowing cross examination. A minister may postpone an answer by requiring "notice" and the questioner is allowed only one supplementary question beyond that put down on the order paper. Some "orchestration" of interrogation is possible if members combine the thrust of their individual questions. However, it is all too easy for the government to parry, evade or resort to witticisms, so that the spectre of "national security" does not usually need to be raised. The inevitable consequence is that members of both the British and Canadian parliaments tend to regard question time more as an opportunity to draw attention, or embarrass than to find out, more as an occasion to put their own opinions in the guise of a question than to solicit meaningful facts and opinions from the cabinet.

Intensive, punishing barrages of questions without adequate answers may, however, sometimes raise doubts in the public mind forcing the governments in both countries to establish Commissions of Inquiry to investigate the matter. These Commissions may be—but are not necessarily—useful in getting facts before the public. A British investigation tribunal, compelled by pressure in Parliament, looked into suspicious deaths at the Hola Mau Mau camp in Kenya in 1958 and made public hitherto unknown facts about the treatment of prisoners. This undoubtedly affected policy towards that colony.⁵⁰ Similarly, Canadian Commissions have investigated circumstances surrounding the defeat and capture of Canadian troops at Hong Kong in 1942 and an earlier alleged wartime scandal in arms and munitions.⁵¹

A recent and potentially promising development in the Houses of Commons of both Canada and Britain is the establishment or strengthening of select committees composed of smaller groups of Members in

50. 605 Parl. Deb., H.C. (5th ser.) 563-564 (1958-59).

51. Report on the Canadian Expeditionary Force to the Crown Colony of Hong Kong (1942); Royal Commission on the Bren Machine Gun Contract (1939).

proportion to their party's strength in the House. Canada created a Standing Committee on External Affairs and National Defence in 1968. It consists of thirty members and has the power to delegate to subcommittees. The Committee may subpoena persons, including officials, as well as documents and records, and, at least in theory, could arrest and bring to the bar of the House for trial and punishment anyone who refused to answer the Committee's summons or behaved in contempt. Its terms of reference, however, are periodically determined by vote of the House where, presumably, the cabinet commands majority support. Also, the Committee's members are chosen by the party whips, which gives the government control over the selection of the majority of members. Nevertheless, the innovation is important. In the Committee, Ministers and bureaucrats can be required to explain policies and can be cross examined much more thoroughly than on the floor of the House during question period. In the words of the Conservative Party's Parliamentary spokesman on legal affairs, some Committees are making a beginning towards equipping themselves with expert staffs, although these are still far from comparable in resources to the foreign affairs and defense committee staffs of the U.S. Congress.⁵²

The British Commons established its first select committees in 1967, with powers of scrutiny and interrogation comparable to the Canadian. Also, like the Canadian committees, the British lack an autonomous power base and the developed staff and research backup of their American counterparts. Most significantly, however, the British Governments have never agreed to the establishment of a Committee on External Affairs and Defence. Just recently, the Expenditure Committee has been authorized to establish a Defence and External Affairs subcommittee, but its terms of reference are narrowly confined "to consider how, if at all, the policies implied in the figures of expenditure and in the estimates may be carried out more economically. . . ."⁵³ Of course, Parliament itself grew from an acorn of Royal fiat not much larger than this, and it remains to be seen whether the subcommittee enlarges its own practice.

Britain has a parliamentary device for disclosure not yet found in its Canadian counterpart, let alone in the U.S. Congress: the Parliamentary Commissioner for Administration. This official, occupying

52. G. Fairweather, *supra* note 48, at 24.

53. R. MacLennan, *supra* note 48, at 15.

a post created in 1967 by Parliament,⁵⁴ appoints his own staff, is paid the salary of a High Court judge, and can only be removed by vote of both Houses of Parliament. His function is to investigate complaints by individuals or corporate bodies who claim to have sustained injustice as a consequence of maladministration by the government or its servants performing administrative functions.⁵⁵ He has subpoena, oath and contempt powers and access to all relevant documents except Cabinet papers and minutes. His reports are made to the party alleging a wrong, the government, the Member of Parliament who referred the case to him, and if further remedial action is needed, to the House of Commons. Public disclosure of documents or information in the Commissioner's report may nevertheless be vetoed by a Minister where it is deemed "prejudicial to the safety of the State or otherwise contrary to the public interest."⁵⁶ The Commissioner is barred by the statute from considering certain matters,⁵⁷ particularly those arising in the area of external relations.⁵⁸ Already, however, that limitation has been rather narrowly interpreted. The Commissioner has investigated a complaint alleging maladministration by the Foreign Office in denying to a group of former prisoners of war held at Sachsenhausen a share of the compensation fund made available by the German government for distribution to British concentration camp victims.⁵⁹ This appears to be a valuable precedent for interpreting "external relations" very narrowly.

In neither Britain nor Canada does treaty-making constitutionally require the participation of the legislature. There are, consequently, greater theoretical opportunities for secret treaty commitments than would be the case in the U.S. However, under the so-called Ponsonby rule, the tradition in Britain since 1924 has been to table all treaties in both Houses of Parliament at least twenty-one days before they are ratified by the executive. In Canada, the practice since 1926 has been to ask the approval of Parliament by resolution before ratifying treaties binding Canada to important military, economic, political or fiscal obligations.⁶⁰ Since no British or Canadian treaty becomes part of the "law of the land" in the American fashion, Parliamentary participa-

54. Parliamentary Commissioner Act 1967, c. 13.

55. de Smith, *Judicial Review of Administrative Action* 40 (2d ed. 1968).

56. Parliamentary Commissioner Act 1967, c. 13, § 11(3).

57. *Id.* at §§ 4, 5, scheds. 2, 3.

58. *Id.* at sched. 3.

59. H.C. Paper 54 (1967-68); 758 Parl. Deb., H.C. (5th ser.) 107-170 (1968); Fry, *Public Law* 336-358 (1970).

60. Resolution of June 21, 1926; 5 Parl. Deb., H.C. (5th ser.) 4758 (1926). See also Gottlieb, *Canadian Treaty Making* 15-16 (1968).

tion is in any event essential to the domestic effectuation of treaty commitments. On the other hand, while the U.S. Constitution requires the consent of two-thirds of the Senate prior to treaty ratification, many international commitments are made by executive agreement free of this limitation. Only in 1972 did Congress pass a law requiring notice of executive agreements within sixty days of their being concluded.⁶¹

The British and Canadian Parliaments have one other way to lift the veil of executive secrecy—the resignation statements of ministers. Cabinet and sub-cabinet officials resign over differences of policy with much greater frequency than in the United States. And unlike the practice in Washington, the system in London and Ottawa accommodates and, to some extent, encourages a public statement of these differences, in the course of which considerable hitherto secret information may be aired. Such information is rarely of the defense security kind, but much of it is valuable to the open political process. This practice of resignation disclosures has been referred to by Aneurian Bevin, himself a master practitioner, as “one of the immemorial courtesies” of Parliament.⁶² The House even provides a time honored place, the second bench below the gangway, from which the statement is made, and it is invariably received with much interest by Parliament and the media. In this way the public and its representatives sometimes catch a glimpse of the red flag of danger hoisted by a former minister over a hitherto little-observed government policy.

In the United States, Congress, too, has attempted in various ways to limit the executive's commitment to secrecy. The separation and the equality of the executive and legislative branches colours the whole process of information flow. To some extent, the United States, unlike Canada and Britain, does not have a parliamentary opposition: rather, the Congress is the natural opposition to government, commanded by the dynamics of institutional rivalry to play this role. While the British or Canadian governments may be willing to share a few secrets with their own parties' loyal caucus, the U.S. President cannot really count on the same overriding loyalty on the part of his party in Congress. And while the sharing of some secrets by British or Canadian Ministers with a Parliamentary Committee would not normally relax the cabinet's control over its dependent followers in the legislature, or open up decision-making to their participation, the U.S. executive

61. Act of Aug. 22, 1972, Pub. L. No. 92-403, § 596, 86 Stat. 619.

62. Aneurin Bevan, 487 Parl. Deb., H.C. (5th ser.) 34 (1951).

does not similarly have this control over Congress. The President must, therefore, expect shared information to make for shared power. The U.S. Congressman, more readily than a British or Canadian Member of Parliament, can translate information into critical inquiry and inquiring into re-direction. It is, therefore, predictable that Congress at times fights harder than the British or Canadian M.P.'s to obtain information, and that the U.S. executive may also resist harder. The battle, in the United States, is fought at a higher level of intensity because the stakes are greater and the institutional set-up is more conducive to conflict.

The Continental Congress which established the Confederal Constitution created a Department of Foreign Affairs in 1782 with a proviso to the effect that "any member of Congress shall have access" to the "books, records and other papers" of the department, except that no copies were to be taken "of matters of a secret nature without the special leave of Congress."⁶³ By 1789, however, confederal had given way to federal union and, under the new constitutional arrangement, Congress enacted a statute establishing an Executive Department of Foreign Affairs. Section 4 of the Act of 1789 entrusted to the Secretary "custody and charge of all records, books and papers" of his office without reenacting the provisions for Congressional access.⁶⁴ This omission is somewhat accentuated by a subsequent Congressional enactment of another law establishing the executive Department of the Treasury. This law provided that the Secretary shall "make report, and give information to either branch of the legislature" concerning all matters delegated to him by Congress or "which shall appertain to his office."⁶⁵ It has been suggested, even by the executive branch, that too much ought not to be made of the inclusion of this provision in the law establishing the Treasury and its omission from the law setting up the department for foreign affairs.⁶⁶ Nevertheless, in Professor Louis Henkin's words, "In foreign affairs, in particular, Congress has itself recognized limitations, for while it has long demanded reports of all executive departments, it has requested them of the State Department only, 'if not incompatible with the public interest'."⁶⁷

63. 7 Journals of Congress 219 (1782).

64. Act of July 27, 1789, ch. 4, § 4, 1 Stat. 28.

65. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65.

66. 6 Op. Att'y. Gen. 326, 333 (1856). The statute setting up the Department of State is: Act of Sept. 15, 1789, ch. 14, § 1, 1 Stat. 68. The statute setting up the Department of War is: Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49.

67. Henkin, *Foreign Affairs and the Constitution* 112 (1972). See also Cannon's Procedure in the House of Representatives, H.R. Doc. No. 610, 87th Cong., 2d Sess., 219 (1962).

It does not follow, however, that there is a *constitutional* basis for this Congressional reticence. Rather, since Congress and the executive are assigned complementary powers over foreign affairs, it is generally assumed that there must be mutual accommodation. This process of accommodation is, by its nature, legally ambiguous. This ambiguity manifested itself, initially, in a Congressional investigation of a military expedition by General St. Clair. The Congressional committee called for the production of all executive papers regarding the campaign. President Washington did deliver the papers but, according to Jefferson, who kept a private record of the cabinet meeting, the executive could "exercise a discretion" as to whether to do so or not, dependent on whether "disclosure . . . would injure the public."⁶⁸ Seen from the Congressional perspective, what matters is that the papers were delivered. From the executive perspective, reinforced by the subsequent controversy over the Jay Treaty papers, which were not delivered to the House of Representatives, what mattered was that the discretion was seen to reside in the executive.⁶⁹ In essence, the accommodations neither prove conclusively that there is a constitutional right on the part of Congress to obtain information or, on the contrary, that there is an executive right to withhold it. Accommodation, rather has been evidence of mutual good sense and a desire to make coordinate but separate powers work.

To compel disclosure of the name of an informer still employed in intelligence work, or the negotiating instructions of a diplomat still engaged in negotiating, or the exact current strategic deployment of nuclear weapons, is as alien to Congress' as to the Executive's sense of national security. But Congress has never conceded that it is a sieve incapable of keeping a secret. A Committee of the House of Representatives, in 1843, during the controversy with President Tyler over the alleged frauds of Indian Agents, specifically declared that Members of Congress are "as competent to guard the interests of the State, and have as high motives for doing so as the Executive can have."⁷⁰ But the point has never been pushed to an absurdity. Very few disputes have arisen, or are likely to arise, over executive secrecy in straightforward defense security matters. Regarding this hard core information, Congress has, by its voluntary reticence, in effect, said

68. 1 Jefferson, Writings 189 (Ford ed. 1892); Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. Rev. 1044, 1079 (1965).

69. Non-delivery can, however, be explained in this instance on the ground that the papers were being requested by the wrong House of Congress. Berger, *supra* note 68, at 1086. Delivery was made to the Senate which shares the treaty power.

70. 3 Hind's Precedents of the House of Representatives 185.

to the executive branch "we will allow you to act as the judge of what may have to remain an executive secret in the field of foreign affairs so long as we are convinced that you are keeping from us only those matters the withholding of which any reasonable Member would recognize to be absolutely essential to the national interest." In 1930, for example, the Senate, as part of its advise and consent function, called on the executive to show it all papers relating to the negotiation of the London Treaty for the limitation and reduction of naval armaments. The President resisted having to produce *all*, on the ground that some documents contained very frank comments on foreign officials. Although a majority of Senators in the debate confirmed the constitutional right of the Senate to require production of all documents, the body nevertheless voted in favor of an amendment that made the demand for production subject to the usual "if not incompatible with the public interest" proviso.⁷¹

Unfortunately, the United States appears now to have entered a period when the mutual confidence underlying this voluntary abstention has been eroded. The responses recently elicited by Senator Ervin's questioning of the Department of Defense concerning Army surveillance of U.S. civilians and data bank programs, as well as the refusal of information to the General Accounting Office of Congress by the Departments of Defense and State, taken together with Congressional reaction to these refusals, suggest that the erosion has gone rather far.⁷² In these circumstances, Congress might come to suspect that the executive's application of the concept of "national interest" has become too much equated with the "executive interest." Inevitably, challenges will begin to appear, contesting the prerogative of the executive to determine unilaterally what does and what does not come within the exempted categories. This challenge to the process of determination would be the product not of any simple dispute about a particular item of information, but the result of a general dissatisfaction with the way the executive was exercising the right itself to make the preliminary determination: a right which the Constitution does not accord it, and which practice has assigned the executive only on the sufferance of Congress.

71. 73 Cong. Rec. 86 (1930). Lib. of Cong., Cong. Research Serv., Am. L. Div., Executive Privilege, Memorandum of June 7, 1971, at 43-45.

72. *Hearings Before the Senate Subcomm. on Separation of Powers of the Comm. on the Judiciary on Executive Privilege: The Withholding of Information by the Executive*, 92d Cong. 1st Sess., at 5-6 (1971). See also Summary Listing of Significant Access to Records Problems in Recent Years at 310-314.

When the impasse occurs, the Constitution leaves the Congress and the executive each to their own devices. The President may lock up the documents in his own office. Congress, in pursuit of its legislative powers, may subpoena and even attempt to lock up recalcitrant executive officials.⁷³ War between the executive and legislative branches is, however, likely to leave the democratic system as its principal casualty. A better solution would be for each branch to admit to itself that a lack of mutual confidence does not, for the time being, permit the legislature to defer wholly to executive judgment on what may or may not be revealed to them. The search could then begin, preferably a joint search, for a new process that would ensure both Congressional access to necessary information and the safeguarding of essential secrets. This process can take many forms, but one principle all forms must include is that it cannot be wholly within the power of either branch to make a determination binding on the other. Operationally, this might suggest either a process of joint determination or of third-party decision making. Either of these approaches would probably have to be augmented with guidelines by reference to which disputed cases could be determined.

A number of proposals have been made to establish such new machinery. Some deal only with the Congressional right to know, whereas other proposed legislation, is applicable equally to members of Congress and to the public in general. The proposals which deal specifically with Congress assume that the legislative branch has a right of—and need for—access to information distinguishable from that of the ordinary citizen, and thus, this need must be met with speedier and more mandatory procedures.

One set of proposals, perhaps the simplest, refers the umpiring function to the courts. There are two separate but related routes to the court. One is via proposed statutory amendments like H.R. 15172 to amend section 552 of title 5 of the United States Code. These broaden the range of judicial review in specific cases where information is refused, making the courts the arbiters of whether a non-disclosure is a legitimate exercise of the limited executive discretion set out in the statute. The other approach has been described by Senator Mathias and may be implicit in proposals by Senators Ervin and Fulbright.⁷⁴ This might be analogized to a "class action" by Congress to de-

73. *McGrain v. Daugherty*, 273 U.S. 135 (1927). See also Lib. of Cong., *Legisl. Ref. Serv.*, *Congressional Power of Investigation*, at 23, 83d Cong., 2d Sess. (1954).

74. Mathias, *Executive Privilege and Congressional Responsibility in Foreign*

termine the larger constitutional issue which the branches of government have so far managed to skirt: does Congress have the right to compel, by token arrest if necessary, the production of information in the possession of the executive branch which the legislators deem essential to the discharge of the legislative function. The first type of judicial approach avoids direct constitutional confrontation, the latter invites it. "In contemplating whether or not, or how, to take this issue to the courts," Senator Mathias has written, "the Congress must face some very difficult questions. There is, to begin with, the question of whether or not the issue is genuinely 'justiciable' or whether or not the Congress has legal 'standing'. . . ."⁷⁵ Professor Raoul Berger has emphatically answered these questions in the affirmative during testimony before a Congressional Joint Committee.⁷⁶

It should also be noted that the Ervin and Fulbright proposals, taken together, require deliberate concurrent determinations by both the legislative and executive branches before a confrontation can occur. On the executive side, under the Fulbright bill, a refusal to disclose based on the separation of powers or an assertion of "privilege" would require the participation of the Attorney General and the President. Full reasons would have to be given for invoking privilege. On the Congressional side, the Ervin resolution provides that, eventually, it is the full legislative chamber which, in a dispute over access, "shall take such action as it deems proper with respect to the disposition" of an unresolved disagreement with the executive.⁷⁷ Thus both sides would have time to consider and negotiate before squaring off in confrontation.

The judicial approach has behind it the tradition which exists in the United States—far more than in Britain or Canada—of using the courts as the umpires of intergovernmental relations. The principal disadvantage, aside from its procedural problems and delays, is that judges are not necessarily either expert at, or eager to acquire expertise in, the intricacies of government security management.

Another third-party way of dealing with the problem is to establish an administrative or arbitral tribunal specializing in security information cases. Britain and, especially, New Zealand, have set up their

Affairs 25-26 (New York University Center for International Studies, mimeo, 1973). Senator Ervin's initiative is S.J. Res. 72, 93d Cong., 1st Sess. (1973). Senator Fulbright's draft bill is S. 858, 93d Cong. 1st Sess. (1973).

75. Mathias, *supra* note 74, at 73.

76. Berger, *supra* note 46.

77. S.J. Res. 72, *supra* note 74, at § 2.

Parliamentary Commissioners as prototypes for filtering certain kinds of secrets. It is too early to adjudge them a success. Currently before Congress is a proposal by Congressman Moorhead which was advanced earlier in somewhat comparable form by Senator Muskie.⁷⁸ The Moorhead proposal, like that of Senator Muskie, pertains to disclosure equally to members of Congress, the press and the citizen. The Moorhead bill provides for a Classification Review Commission which would have power to downgrade or declassify all government information. It would be composed of nine members, three appointed by the Speaker of the House of Representatives, three by the President Pro Tempore of the Senate, and three by the President. In each case not more than two of each three could be appointed from the same political party.⁷⁹ The Muskie proposal would have established a Disclosure Board consisting of seven members appointed by the President, by and with the advice and consent of the Senate.

The Moorhead approach is weighted in favor of the legislative branch. Its enactment therefore might depend on sufficient Congressional support to override a Presidential veto. Also, although a mixed executive-legislative tribunal to review secrecy classification would undoubtedly help the cause of access, its procedures might not necessarily be very much simpler or speedier than those of the courts.

If an administrative tribunal or court is to make difficult decisions, it must have a narrow, workable set of guidelines. If secrets pertaining to foreign relations are to be reviewed, there must be standards by which a review may be conducted. "Foreign relations" is often treated as a homogenous category, all components of which are presumed to be equally in need of the umbrella of secrecy. William Rogers, as Attorney General in the Eisenhower Administration, listed the categories of information which ought to be kept secret. One of these is "information which would adversely affect our national security." Another is "the field of foreign affairs" where there are "compelling reasons for non-disclosure."⁸⁰ In Rogers' view "foreign affairs" is a discrete category, separate from the "national security" category. In this view, everything pertaining to or affecting matters beyond the boundaries of the United States is potentially entitled to secrecy at the sole discretion of the executive. Obviously, a third-party or joint review process could not function within such an overly broad exclusionary rule.

78. S. 2965, 92d Cong., 1st Sess. (1971).

79. H.R. 15172, 92d Cong., 2d Sess. (1972).

80. Rogers, *Constitutional Law: The papers of the Executive Branch in Hearings on Executive Privilege*, 44 A.B.A.J. 941 (1958).

How well a tribunal is able to operate in reviewing classification must depend on the extent to which the traditionally hush-hush "field" of "foreign affairs" is divided up into narrow security categories that may need protection and broad non-security categories—like foreign trade and commerce, environmental protection and others—which do not. The Muskie proposal permits secrecy only for "information the declassification of which would clearly and directly threaten the national defense of the United States." Even this may be too broad. If a third party process is to be used, then it should determine not only: "is this a secret the revelation of which would do serious harm to the national defense?" but *also*, "is this a secret the continued suppression of which would do serious harm to the democratic process?" It should hear evidence on both points and weigh up the balance. This could probably be done by an expert tribunal but almost certainly not by an ordinary court. The Commission contemplated by the Moorhead legislation does have a different sort of useful discretion. If it be believed that certain information should be revealed to Congress, or to some members of Congress, but not to the press and the public, it may balance the need of Congress, of a Committee or of a Member of Congress against the extent to which disclosure "would be contrary to the public interest or would seriously endanger the national defense of the United States." In deciding to make information available, the Commission could "assure that access to the information be limited to Members of Congress whose responsibilities require access to such information . . ." and order that the "discussions with respect to such information shall take place in executive session of a committee of Congress and closed session of either the Senate or the House of Representatives. . . ."

The Muskie proposal also provides a separate procedure by which Congress or component committees or designated members might be given a right to information, sometimes in secret, without the right being necessarily and invariably extended to the press or general public.

There is another group of proposals which attempts to achieve greater access without recourse to adversary or third-party process. One of the more far-reaching of these is made by Thomas L. Hughes, a former Director of Intelligence and Research in the U.S. Department of State.⁸¹ Hughes proposes a Permanent Joint Committee on Intelligence Estimates composed of approximately 14 members of Congress, serving rotating terms, including the Speaker of the House of Repre-

81. Hughes, *supra* note 17, at 36-41.

sentatives and the majority and minority leadership of both Houses, members of key Committees having to do with foreign affairs, armed services, atomic energy and appropriations, and also of other members. This Congressional group would receive *all* national intelligence estimates.

The advantage of this proposal is that it requires no judicial or quasi-judicial enforcement and that it provides across-the-board disclosure of *all* information, thereby skirting the vexed question of appropriate standards for disclosure. There are risks: security risks for the executive and risks of co-option for Congress. But the intelligence community would probably welcome an opportunity to have the ear of key members of Congress, if only because their views would then also have to be considered more seriously by the executive branch decision-makers.

A variation on this approach is the secrecy ledger. This proposal would require all classifiers in all departments to send weekly lists of current documents they have classified to a central registry office in the White House together with a broadly accurate but discreet indication of their content. A consolidated register would be prepared and forwarded to all members of Congress who could then request, as a matter of right, access to a particular document. In a less radical version of this proposal, a request for access would take a vote by Congress, or, by the responsible Committee. Once made, the request would have to be honored. There might be very narrow exceptions to cover negotiating instructions, names of informers or foreign informants, and purely in-house memos. Further, the register might be made available only to a committee of key members of Congress who, alone, would have the right to see any entry.

What most of these proposals incorporate is a set of three principles which are probably essential to any reform of the U.S. information management system as it pertains to foreign affairs:

- 1) That the Congress, in the field of foreign relations, has a particularly cogent right to know, which is as real as that of the executive;
- 2) That this right can be satisfied by the executive either by a willingness to tell a select, representative group of Congressmen *anything* or by a willingness to tell *every* member of Congress *almost anything*;⁸²

82. One step in the direction of a general requirement of production is Act of

- 3) That the alternative is for Congress to set up a rival information-gathering network, which would be serious admission of the failure of that cooperation between the two branches which must underlie any effective exercise of their coordinate foreign relation powers.

B. Foreign Affairs Secrecy and the Citizen

The citizen is politically affected by secrecy in the same way as a Member of Parliament or Congress: that is, his political choice will be less informed and democracy will be undermined to the extent that his vote is based on incomplete or mis-information. But, whereas the citizen, ordinarily, will only be asked to pass judgment on the executive conduct of the nation's business every four or five years, members of the legislature must do so frequently. Also, citizens are seldom likely to exercise their vote primarily on matters of foreign affairs, while legislators do vote on specific foreign affairs items, appropriations and authorizations. The needs of the legislator and of the citizen thus differ as to the specificity and timeliness of the information they need.

Paradoxically, the citizen's role in Britain, Canada and the United States is frequently emphasized by the executive branch. In British and Canadian constitutional practice, the tight control the cabinet exercises over the parliamentary members of the party is rationalized on the ground that it is the people, not individual members of parliament, who choose and must ultimately pass judgment on the conduct of the cabinet. Similarly, the relative abstinence of courts from judicial review of executive acts in Britain, Canada and the United States is justified on the ground that the proper place to redress political grievances is in a general election.⁸³

If the courts and even, in Britain and Canada, the legislators are to be kept on a short leash, then national elections assume a proportionately greater role in the democratic control of government. Lack of adequate information by the voters subverts that role as effectively as if there were no elections.

Aug. 22, 1972, Pub. L. No. 92-403, § 596, 86 Stat. 619, which is an Act that requires that international agreements other than treaties (i.e. executive agreements) entered into by the United States, be transmitted to the Congress within sixty days after their execution.

83. *Diggs v. Schultz*, 470 F.2d 461 (D.C. Cir. 1972), in which the Court held that the executive decision to violate the Rhodesian chrome embargo, although violative of international and U.S. treaty law "present issues of political policy which courts do not inquire into."

In the United States, the executive has withheld information from Congress on the ground that as a separate, independent and co-equal branch of government it is responsible not to Congress but to the voters. This implies a particularly direct accountability to those voters, not least to supply the data necessary to an informed election. The executive quotes with approval Marshall's dictum in *Marbury v. Madison* that "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his conscience."⁸⁴ In Britain, the executive is accountable to Parliament, at least in theory, as well as to the people. To the extent that executive accountability, in the United States, is directly to the people alone, there would seem to be a special constitutional requirement of openness. This has, of course, been recognized in the First Amendment to the Constitution, for which there is no British or Canadian parallel.

In democratic systems, there are various ways in which the public can obtain information about the government's activities. The government's own voluntary disclosures is only one of these. Another is by invoking laws that compel disclosure. A third is via disaffected government officials who are willing to speak up or to leak information.

Laws compelling the government to disclose information to citizens are confined primarily to a few democracies: Sweden and the United States in particular. Both the disclosure requirement, which is, embedded in the Swedish constitution,⁸⁵ and the much more recent (1966) American Freedom of Information Act, specifically exempt defense and foreign relations from the requirement of disclosure. The first exemption in the Freedom of Information Act relates to matters "specifically required by Executive Order to be kept secret in the interests of the national defense or foreign policy."⁸⁶ The general classification system set out in Executive Order 10501, as amended by Executive Order 11652, has been used to meet this requirement for a specific finding that an item ought to be kept secret. The Supreme Court, in the *Mink* case, has held executive self-determination to be unreviewable, apparently even for error or *mala fides*.⁸⁷ For the

84. 5 U.S. (1 Cranch.) 137, 165 (1803).

85. For a discussion of this provision of the Swedish constitution see Franks Report, *supra* note 14, at 33.

86. 5 U.S.C. § 552(b)(1) (1970).

87. *Environmental Protection Agency v. Mink*, 93 S. Ct. 827 (1973).

FOIA to have any effect on the citizen's right to know, the law would have to be amended to require judicial review, possibly *in camera* and to narrow the category of what may be kept secret. An example of a narrower category is that proposed in the 1971 Muskie bill (S.2965) (discussed above). This standard, especially if applied by an impartial special tribunal and/or the courts, would certainly help extend the purpose of FOIA into the foreign affairs field from which it is now arbitrarily excluded. The current category is arbitrary because there is nothing about foreign affairs, as such, which makes all information about it inherently sensitive. Within the defense and foreign relations field there are many kinds of information (see the *taxonomy*) that are currently exempt from disclosure. Only a very few of these subcategories really need blanket protection from disclosure.⁸⁸

Older provisions of the U.S. Administrative Procedure Act⁸⁹ suffer from disabilities similar to those of FOIA. The Act requires that an Agency in the process of rule making must give public notice; describe the proposed rule; give interested parties an opportunity to be heard; render a decision supported by the record, and state the basis and purpose of the decision. But these procedural safeguards do not apply "to the extent that there is involved a military or foreign affairs function of the United States."⁹⁰ Again, there is no convincing reason of security—as distinct from reason of politics—why this exemption could not be far narrower: confined, for example, to "rule makings in respect of which the application of these procedures would clearly and seriously threaten the national defense."

As it stands, the FOIA and other APA provisions are virtually useless in the whole vast foreign policy sector. And in Britain as well as Canada there is no "right to know" legislation at all. The upshot is that in all three countries, the public, with the help of the press, have had to rely wholly on what they were told officially or else have devised their own self-help to get the information essential to an independent judgment of the government's performance.

Whether or not such self-help is available to the public turns, in part, on socio-political and cultural realities: the degree to which the press, for example, diligently and independently ferrets out informa-

88. The Moorhead proposal to revise FOIA, H.R. 15172, *supra* note 79, also applies a "national defense interest of the United States of the highest importance" test for review of executive classification by its proposed Commission.

89. 5 U.S.C. §§ 551-559 (1970).

90. *Id.* at §§ 553(a)(1) and 544(a)(4).

tion, free of a governmental "buddy system" of extra-legal rewards and punishments. To a large extent, however, self-help, in the U.S., Canada and Britain, depends upon some of those inside the government, being willing to purvey information to the press and public without authorization. There are wide differences between Canada and Britain, on the one hand, and the United States on the other in the way this "self-help" occurs and in the extent to which it is inhibited by law and professional sanction.

It has already been noted that the unwritten rules of the British and Canadian parliamentary government do little to inhibit and, indeed, institutionalize the ministerial resignation statement. These statements frequently go into considerable informational detail to reveal the resigner's reasons for opposing a current governmental policy. Despite the broad sweep of the British and Canadian Official Secrets Acts, no Minister in either country, in this century, has been prosecuted for his revelations. The practice of making candid public statements is widespread—somewhat over half the British Ministers who resign make such disclosure statements. But public disclosure under these circumstances, providing there are no direct quotes from cabinet documents, carries neither criminal penalties nor career-costs. A study by the present authors of all British resignations from government between 1900 and 1970 reveals that those like Eden, Salisbury and Wilson, who resign with calculated indiscretion generally do at least as well in terms of subsequent political career—in fact, a bit better on the average—than those of their colleagues who keep silent. It is at least worth speculating how different the political temper of Congress, press and public in the United States might be, today, if a McGeorge Bundy, McNamara or John Gardner had "gone public" after leaving government. Would it have been necessary for an Ellsberg then to have taken the Pentagon Papers to *The Times*? In the United States, however, there are hardly any instances of such public resignations. Despite the absence of an Official Secrets Act, the career costs of calculated indiscretions of the kind commonplace among British leaders, are horrendous in America. The few Americans to have tried it—William Jennings Bryan, Lindley Garrison, Webster Davis, Mable Willebrandt—were never seen in government again. Career costs are probably a more effective tool even than criminal law for silencing dissent.

Leaking, too, is a tradition in Britain which, while not exactly delighting the Prime Minister, has a certain institutional respectability. Rt. Hon. Patrick Gordon Walker, himself a former Foreign Minister, makes a revealing distinction between ordinary leaks of cabinet secrets

and the disclosure of true "state" secrets "such as the details of a budget, a decision to devalue, military and security matters."⁹¹ The former are not only tolerable but, he believes, necessary to the healthy operation of the system. Many of the most important permissible leaks have been in the field of "foreign affairs", the most recent being in connection with the supply of arms to South Africa⁹² and Kenya's expulsion of Asians.⁹³

Beyond such patterns and traditions of political behavior lies the law. In Britain and Canada there are Official Secrets Acts, and these are currently under review in both countries. In the United States there are the Espionage Laws and these, too, are currently the subject of proposed amendments. But, while the British proposals, contained in the September 1972 report of the Franks Commission, tend to be in the direction of narrowing the use of the criminal law that discourages self-help, the U.S. trend appears to be in the opposite direction.

As the Official Secrets Act⁹⁴ of Britain now stands, its reach is broader than anything in the United States: indeed, than anything that would be permissible under the U.S. Constitution. Section 1 of the Act has to do with spying, not with the communication or publication of official information for other purposes. There must be a showing of a subjective "purpose prejudicial to the safety or interests of the State" and it must further be established that the information "is calculated to be or might be or is intended to be useful to an enemy." Thus there are two tests: 1) prejudicial purpose, and, 2) usefulness to the enemy.⁹⁵ In at least one recent instance, however, this provision has been used to convict persons who were not within the ordinary meaning of "spies". The leaders of the 1961 nuclear disarmament marchers who intended to occupy a military airfield to disable it temporarily were found to have conspired to invite persons to commit a violation of this section.⁹⁶

Section 2 of the Act reaches a quite different category of acts and purposes. This provision makes it an offense for any government official, to disclose any official information, (i.e. obtained in the course of his employment), whether secret or not, except to authorized persons. It is also an offense for anyone unlawfully given such informa-

91. Walker, *supra* note 36, at 27.

92. *Id.* at 29-30.

93. *Id.* at 30.

94. Official Secrets Act 1911, 1 & 2 Geo. 5, c. 28, § 18, sched. 2.

95. Franks Report, *supra* note 14, at 111.

96. Chandler v. Director of Public Prosecutions, [1964] A.C. 763.

tion, even a journalist, to publish it or communicate it to anyone else. It is, further, an offense for any person having been entrusted with information in confidence, or as a government contractor, or employee of such, to disclose it under any but authorized circumstances. The possibilities for prosecution under this provision are virtually unlimited. The fact that the provision has been used sparingly in Britain and very rarely in Canada does not preclude speculation about its "chilling" effect.⁹⁷ There have been very few prosecutions of newspapers or journalists in Britain, one exception being a military newspaper in World War I and the second a recent prosecution arising out of the Nigerian civil war. The latter was not only lost by the government but led the judge to call for the "retirement" of the section.⁹⁸ This, in turn, produced the Franks Commission and its report, with its recommendations for narrowing the law. But if there have been very few British prosecutions of newspapermen this may be, in part, because of the chilling effect of the Act and the "D" Notice system by which, in effect, journals "voluntarily" muzzle themselves at the Government's suggestion when an item seems security sensitive. Canada has no "D" Notice system, and no prosecutions have been taken against Canadian media, at least within the past three decades.

There have been no prosecutions at all, in Britain, of the large number of Prime Ministers, Ministers and Members of Parliament who have taken to publishing "instant" memoirs. These appear to be considerably more indiscreet than those of their American or Canadian counterparts and help to undermine the protective custody in which OSA places official information.

Disclosures by British and Canadian Ministers and ex-Ministers and their most senior government advisers, it is generally accepted, are "self-authorized"⁹⁹ and thus escape the prohibition. In the twenty-nine British prosecutions under section 2 turned up by the Franks Commission, fully twenty-five of the defendants were present or former lower echelon civil servants, contractors or military personnel. Of

97. This "chilling effect" in Britain is compounded by the "voluntary" D-Notice system which is not subject to criminal penalties for violation but nevertheless carries the implication that violators face charges under the Official Secrets Act. Canada has no comparable chiller.

98. The judge in an unreported opinion, said, "The 1911 Act achieves its sixtieth birthday on 22 August this year. This case, if it does nothing more, may well alert those who govern us at least to consider, if they have the time, whether or not Section 2 of this Act has reached retirement age and should be pensioned off . . ." Harry Street, *Secrecy and the Citizen's Right to Know: A British Civil Libertarian Perspective* 22 (New York University, Center for International Studies, mimeo, 1972).

99. Franks Report, *supra* note 14, at 14.

those prosecuted, incidentally, nineteen were only fined, received suspended sentences, or had their charges dropped.¹⁰⁰ Typical of the rare severer prosecutions are those of policemen giving information to criminals.

It could therefore be argued that the British Act is, in practice, not as bad as it looks. Indeed, the fact that the Act looks so bad may have a reverse "chilling effect"—on prosecution. But the Franks Commission has recommended fairly extensive surgery, proposing the repeal of section 2 and its replacement with an Official Information Act which would apply only to certain specified information. Among these, is "classified information relating to defence or internal security, or to foreign relations" but *only* where "the unauthorized disclosure . . . would cause serious injury to the interests of the nation."¹⁰¹ This new standard, somewhat resembling several proposals currently before the U.S. Congress for narrowing the "foreign affairs" category, is an undoubtedly libertarian advance. However, the British law reform deals not with rights of public access as such, but with prosecution for facilitating unlawful access: the two are related but different. Prosecutions are to be initiated only at the instance of the Attorney General, and only after a full review of whether the information, at the time it was communicated, was properly and highly classified: *Secret* or above, or *Defence-Confidential*. Franks also proposes to leave the crucial determination of what revelation "would cause serious injury" in the discretion of the government. No document the government's pre-prosecution review finds to be improperly classified, and no information which is unclassified, or classified at a lower level than *Secret* could be the basis of any prosecution.¹⁰² These proposals are not universally welcomed in Britain. They have led to vociferous criticism, for not going far enough, from British civil libertarians who call for the total repeal of s.2, leaving only espionage subject to criminal penalties.¹⁰³

In the United States, meanwhile, there is both dispute about the extent to which communication and publication can give rise to criminal penalties and a series of proposals before Congress to ensure such penalties in cases short of espionage.

The principal thrust of the Espionage Laws in the United States, as in s.1 of the OSA, is to prevent the deliberate transmission of valu-

100. *Id.* at 116-118.

101. *Id.* at 101.

102. *Id.* at 103-104.

103. Street, *supra* note 98.

able information to an enemy. The basic ingredients of the offense are, thus, *culpable intent* and *harmful effect*. These ingredients are set out in most, but not all the offenses.

Section 794 contains two principal provisions, of which the first, s.794a, prohibits the communicating of any "information relating to the national defense" to "any foreign government, or . . . (agent. . . ." A conviction under this section can only be obtained if the alleged act was committed, (1) "with intent or reason to believe that [the communicated information] is to be used to the injury of the United States or to the advantage of a foreign nation . . ." and (2) if the information is demonstrably of a kind "relating to the national defense." It is believed by Professor Benno Schmidt, Jr., on the basis of extensive study of the legislative history, that the requirement of "intent to communicate to a foreign government" is not met where information reaches that foreign government only incidentally to a publication the primary purpose of which was to inform the American public.¹⁰⁴

Section 794(b), on the other hand, prohibits "publication" of "information relating to the public defense, which might be useful to the enemy. . . ." But a conviction under this section requires a showing of "intent that the [information] shall be communicated to the enemy" as well as that the information relate to "the public defense" which is illustrated by reference to such items as movement of ships, plans for naval operations or of fortifications. This section, also is limited to "time of war" but, Congress inadvertently duplicated the enumeration in s.798 of Title 18 enacted in 1953,¹⁰⁵ which also makes s.794(b) applicable in a Presidentially proclaimed state of national emergency—such as is still presently in effect.

The important lesson of this section's legislative history, in Professor Schmidt's words, is that Congress intended to penalize the publication of information *only* when there was a "conscious purpose" thereby "to inform the enemy."¹⁰⁶ It is interesting to speculate who "the enemy" might be in peacetime: whether, for example, discussions with Hanoi of plans for U.S. troop withdrawals fall within the exceedingly vague concept of communicating defense plans to peacetime "enemies." Unlike the Official Secrets Act, no specific exception is made for persons "authorized" or self-authorized.

104. Schmidt, *The American Espionage Statutes and Publication of Defense Information* 14-15 (New York University Center for International Studies, mimeo, 1973).

105. Act of June 30, 1953, Pub. L. No. 83-99, § 4, 67 Stat. 133, extending 18 U.S.C. § 794 (1948) codified at 18 U.S.C. § 798 (1953).

106. Schmidt, *supra* note 104, at 18-19.

Section 793, although still within the Espionage Act, does not require actual transmission, or attempts, or conspiracies to transmit information to an "enemy" or even a "foreign government" as in s.794. The Franks Commission thus rightly considered this section "relevant" to its review of legislation—that is, comparable to the Official Secrets Act.¹⁰⁷ But there are differences. Section 793(a) makes it an offense to go upon, enter or obtain information about a large number of things like vessels, arsenals, canals, research laboratories "for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation." But it does not punish the communicating of any information, as does the OSA. There must be culpability and/or the likelihood of "injury" to America or "advantage" to another state.

Under section 793(b) it is an offense to "take" documents or "make" copies of documents of "anything connected with the national defense. . . ." To constitute a crime, the act must be committed with the same purpose and intent as in 793(a). It has been held that the requisite purpose and intent is tantamount to "bad faith."¹⁰⁸ To convict under either subsection, there must be a jury finding (1) of *scienter*;¹⁰⁹ and, also (2) "Whether any given document relates to the national defense. . . ." The latter, emphatically, "Is not a question of how they were marked" by the classifier.¹¹⁰ But the vagueness if the standards for requisite finding (2) has led the courts to emphasize finding (1) in an effort to save the statute from being void for vagueness. Thus, the courts have tended to insist that the *scienter* must not merely be a knowledge that the probable cause of relaying information may be to injure the United States or benefit another country, but that this must actually be the purpose of the taking and communicating. Professor Schmidt's analysis of the legislative history of the sections bears this out.¹¹¹

Sections 793(d) and (e) differ from the provisions so far discussed, in that there is no culpable intent requirement in the statutory language. Under 793(d), anyone lawfully having possession of, or access to, any document or other instrument, model or appliance "re-

107. Franks Report, *supra* note 14, at 129-130. The Commission could not help introducing into its summary of § 793 the proviso, found in OSA but not in Title 18, of communicating information "to an unauthorized person."

108. *Gorin v. United States*, 312 U.S. 19, 28 (1940).

109. *Id.*

110. *United States v. Drummond*, 354 F.2d 132, 152 (2d Cir. 1965).

111. Schmidt, *supra* note 104, at 26-29.

lating to the national defense," would appear to be guilty of an offense if he "willfully communicates" it to "any person not entitled to receive it. . . ." Only as to "information relating to the national defense" does the section impose a *scienter* test. It is criminal to communicate "information" only when "*the possessor has reason to believe [it] could be used to the injury of the United States or to the advantage of any foreign country.*" Perhaps these words could be read to apply also to the willful communicating of documents, models and the rest. The enigmatic adverb "willfully" could be made to carry this freight. Otherwise, the whole section is probably unconstitutionally vague. The same applies to 793(e), which, however, even makes a crime of simple retention, without communication.

Sections 793(d) and (e) were, in their original incarnation, as section 1(d) of the Espionage Act of 1917, intended to apply only to government employees, which helps to explain the absence of a *mala fides* requirement. When, by the Internal Security Act of 1950, Congress intentionally extended the crime of "retention" to persons outside government, it also, probably in confusion, extended the crime of non-culpable taking and communicating. As a result, these sections are at best muddled and, at worst, unconstitutional.¹¹²

In addition to the Espionage Act, the United States also has in its armory Title 50 of the Code, section 783 of which, applying only to government employees, makes it an offense to communicate any classified information to an agent or representative of a foreign government or an officer or member of any communist organization. The giver of the information must know that it is classified and that he is giving it to someone within the prohibited categories, but that is all the motive that need be proven. *Mala fides* need not be shown and the classification is not reviewable by the court.

This last section is notable if only for being an exception to the principle, oft and fondly cited in Britain and the United States, that the government's classification system is an internal managerial matter, not criminally enforceable against private citizens. In Britain, the *Franks Report*, despite its general liberalizing thrust, would for the first time formally link British criminal law with the classification system. This is not necessarily bad news for British civil libertarians since, at present, all government information, classified or trivial, is embargoed by criminal sanction. The linking of sanctions only to the upper levels of classification could be seen, in the British context, as a halting

112. *Id.* at 31.

step in the direction of less secrecy through criminal enforcement. On the other hand it can be argued that *Franks*, by trying to rationalize a near-dead-letter law, is likely to revive it. In the United States, however, there can be no such ambiguous reaction to the proposed changes in the criminal code.¹¹³ The further linking of classification with criminal sanctions against leaking by bureaucrats or other "authorized" persons is quite clearly a step towards greater suppression of all classified information.¹¹⁴ The "authorized person" could then be punished for communicating to any "unauthorized person"—not just to a foreign government. This is obviously intended to catch leakage that is in no way tainted with spying or harm to the nation.

The new United States proposals are also particularly restrictive in another sense. They seek to stem the flow of unauthorized information by eliminating the need for the prosecution to show that a disclosure caused or could cause injury to the United States or benefit to an enemy. All "national defense" information becomes a ward of the criminal law, whether classified high, low, not at all, or incorrectly. Under the new proposals, a "person is guilty of an offense if he knowingly communicates information relating to the national defense to a person not authorized to receive it."¹¹⁵ This, by the definition of "information relating to the national defense," could include any information, classified or not, "relating to . . . the conduct of foreign relations affecting the national defense" whether the information were harmful to the U.S. or only embarrassing to the credibility of some of its political leaders.

Unauthorized information is democracy's principal antidote to unfettered government discretion, particularly in foreign affairs. If the proposals of the U.S. government are passed in the United States, and the *Franks* proposals are adopted in Britain, the American restrictions on unauthorized disclosure will have the dubious distinction of having become more severe than Westminster's Official Secrets Act. More dramatically, the United States, alone, will have taken a long step backwards in the evolutionary march of freedom and public participation.

113. See especially, S. 1 and S. 1400, 93d Cong., 1st Sess. (1973). S. 1400 is the Criminal Code Reform Act of 1973 and the relevant provisions are §§ 1122-1126.

114. *Id.* at § 1124.

115. *Id.* at § 1122.